by the Constitution. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491 (1983) ("This Court's cases firmly establish that Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution."). In this case, although petitioners may arguably satisfy constitutional jurisdictional requirements, they cannot satisfy statutory jurisdictional requirements. Therefore, the petition must be dismissed, as "[w]ithout jurisdiction the court cannot proceed at all in any cause." *Ex parte McCardle*, 74 U.S. at 514.

A. PETITIONERS' JURISDICTIONAL CLAIM

Petitioners attempt to invoke the jurisdiction of this Court based upon 28 U.S.C. § 1254(1). [Pet. 1]. This statute, however, is completely inapplicable to the current case and cannot provide a basis for granting certiorari, as it applies only to "[c]ases in the courts of appeals". 28 U.S.C. § 1254. The fact that New York's highest court happens to be called the Court of Appeals is not sufficient to treat this case as if it were from a federal circuit court of appeals. Instead, 28 U.S.C. § 1257 is the relevant statute governing appeals from a state's highest court. *See Webb v. Webb*, 451 U.S. 493, 495 (1981) ("Because this case come to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. § 1257.").

This is not an inconsequential distinction, as the two sections provide for appellate jurisdiction in very different circumstances. Section 1254 does not limit the Supreme Court's jurisdiction to particular types of cases, but instead provides for review by writ of certiorari in "any civil or criminal case". 28 U.S.C. § 1254(1). Section 1257 significantly limits the Court's appellate jurisdiction over state court cases, as discussed further in Part I(B), *infra*.

Nor does it appear that petitioners' citation to Section 1254 was simply a typographical error, as no portion of the petition addresses the specific jurisdictional limitations imposed by Section 1257 or contends that this case satisfies those requirements. Instead, the petition is devoted to addressing why this Court should grant certiorari, under the considerations set forth in Supreme Court Rule 10. However, this rule cannot convey jurisdiction. Rather, the rule serves only to explain the standards which the Court will employ in determining whether or not to grant certiorari, an issue which cannot be reached unless and until jurisdiction has been established.

B. STATUTORY JURISDICTION

In order for this Court to undertake review of this case, petitioners must establish that appellate jurisdiction exists under the statutory framework imposed by Congress. As stated in Part I(A), *supra*, petitioners have relied upon the wrong statute as conveying jurisdiction in this case. The Supreme Court's authority to review a final decision by the New York State Court of Appeals is governed by 28 U.S.C. § 1257(a). *See Illinois v. Gates*, 462 U.S. 213, 217 (1983) ("Our certiorari jurisdiction over decisions from state courts derives from 28 U.S.C. § 1257). The statute provides that

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where [1] the validity of a treaty or statute of the United States is drawn in question or [2] where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of

> the United States, or [3] where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a) (numbers in brackets added).

It is clear from the text of the statute itself that petitioners cannot establish jurisdiction. The statute specifies only three instances where a final judgment by a state's highest court may be reviewed by the United States Supreme Court, none of which apply to this case. The first two possibilities are clearly inapplicable, as petitioners do not challenge the validity of any treaty or state or federal statute. In fact, aside from the jurisdictional issues relating to 28 U.S.C. § 1257, no statutes are involved in this case. The third possible scenario is also inapplicable, as petitioners do not claim any right, privilege, or immunity under the Constitution, treaties, or statutes of the United States.

The appellate jurisdiction provided by 28 U.S.C. § 1257(a) is often referred to, and discussed in opinions, as the "the authority to review federal-question decisions made by state courts". *Jefferson v. City of Tarrant*, 522 U.S. 75, 76 (1997). Therefore, "unless a federal question ha[s] been both raised and decided in the state court", the Supreme Court does not have jurisdiction to review the case. *Illinois v. Gates*, 462 U.S. at 218. This rule must be scrupulously adhered to, "regardless of the significance of the underlying issue". *Adams v. Robertson*, 520 U.S. 83, 92 fn. 6 (1997).

To support jurisdiction, the federal question must also be substantial. *See Reich v. City of Freeport*, 388 F. Supp. 953, 955 (N.D. Ill. 1974) (noting that Supreme Court may only review the final judgment of a state's highest court "where a substantial federal question is involved."). *See also Benz v. New York State Thruway Auth.*, 369 U.S. 147, 147-148 (1962) (dismissing writ of certiorari as improvidently granted where case presented "no substantial federal question."). A federal question is not substantial, and will not support jurisdiction for review of a state court decision, where it is unsubstantial or frivolous. *See, e.g., Ennis Waterworks v. City of Ennis*, 233 U.S. 652, 657 (1914).

In order to satisfy the jurisdictional requirements of 28 U.S.C. § 1257(a), petitioners must demonstrate that they claimed a federal right, privilege, or immunity which was denied by the state court. *Cf. Allen v. Arguimbau*, 198 U.S 149, 154 (1905) (dismissing writ of error). Petitioners do not claim or assert any federal right, and any attempt on their part to do so would be frivolous and without support in law or fact. Although petitioners mention the First Amendment and the neutral principles of law doctrine, neither of these provide them with any right or privilege which is relevant to their claims.

The neutral principles of law doctrine simply provides that, in a dispute involving a religious organization, a state may determine an issue by resort to principles of state law which do not involve an inquiry into religious doctrine. *See R.W. Jones, Sr. v. Wolf*, 443 U.S. 595, 602-603 (1979). However, neither the First Amendment nor the neutral principles of law doctrine require that a state follow any particular method for resolving such disputes. *See id.* at 602. Instead, where the neutral principles of law doctrine applies,

it is up to the state court to determine the issue and no federal question is presented. *See Maryland & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 368 (1970) (dismissing appeal for want of a substantial federal question). The neutral principles of law doctrine does not require a state to affirmatively recognize a particular cause of action in tort.

Additionally, even where a sufficient federal question exists which might otherwise provide for jurisdiction, the Supreme Court will not review a state court decision unless that federal question has "been both raised and decided in the state court below." *Illinois v. Gates*, 462 U.S. at 218. *See also Crowell v. Randell*, 35 U.S. 368, 392 (1836) ("If both of these requirements do not appear on the record, the appellate jurisdiction fails."). If the state court does not decide the issue, the Supreme Court may not consider it as the basis for jurisdiction. *See State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945) ("Since the [state] Supreme Court did not pass on the question, we may not do so.").

This rule "permit[s] a state court . . . to rest its decision on an adequate and independent state ground." *See Illinois v. Gates*, 462 U.S. at 222. The Supreme Court "will not review a state court judgment when there is a nonfederal ground that independently and adequately supports the judgment." *Oregon v. Gefre*, 903 P.2d 386, 390 (Or. 1995). *See also Webb v. Webb*, 451 U.S. at 500 (noting that rule ensures state courts are provided opportunity to determine case on independent and adequate state grounds "that would pretermit the federal issue"); *United States v. Burke*, 90 F. Supp 868, 871 (E.D. Pa. 1950) ("a denial of a properly raised federal claim will not be disturbed when the judgment rests on adequate nonfederal grounds.").

Petitioners bear the burden of establishing that the federal question was properly presented to the state courts. *See Adams*, 520 U.S. at 86 (finding that petitioners failed to satisfy burden). If the state court is silent on the issue, there is a presumption that the issue was not properly presented, and, in order to establish jurisdiction under Section 1257, petitioners must present sufficient evidence to defeat this presumption. *See id.* at 86-87. *See also Burke*, 90 F. Supp. at 871 ("When it is not evident whether the federal issue has been passed upon, the Supreme Court will attribute state law, unless no other reasonable course is open, as the basis of the state court's judgment.").

The mere fact that a state court cites or discusses federal law is not sufficient to establish that the decision was based on federal grounds. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Even where a state court relies upon federal precedent for guidance, the Supreme Court "will not undertake to review the decision" as long as the state court indicates that the decision "is alternatively based on bona fide separate, adequate, and independent grounds". *Id.*

In the current case, petitioners seek review of the decision rendered by the New York State Court of Appeals. However, that decision clearly demonstrates that, to the extent that any federal question was involved, the judgment was based on adequate and independent state-law grounds. First, the Court held that petitioners' claims for battery could not succeed because "as a matter of law the sexual relationship between the parties was indeed consensual" and there was no evidence that Wende C.'s ability to consent was impaired. [Pet'r App. C-31a-32a]. This holding was based upon the specific facts of the case, [Pet'r App. C-31a-32a], and "in the absence of exceptional circumstances," the Supreme Court "defer[s] to

state-court factual findings. . . ." *Hernandez v. New York*, 500 U.S. 352, 366 (1991).

The Court then addressed petitioners' purported claim for breach of fiduciary duty. The Court specifically indicated, repeatedly, that this cause of action was not properly pled. [Pet'r App. C-32a-33a ("Moving next to plaintiffs' contentions that Pastor T. breached his fiduciary duties to them, we note that these causes of action were not specifically pleaded."); ("Given that no fiduciary cause of action is properly before us. . . .")]. To whatever extent a federal question may have existed in relation to petitioners' attempted breach of fiduciary duty claim, the Court of Appeals made it very clear that it was not deciding that question, as the claim could be resolved on state law grounds governing rules of pleading. The Court stated: "Given that no fiduciary cause of action is properly before us, we leave open for another day the question of whether such a claim may arise between a cleric and a parishioner under very different circumstances, not present here." [Pet'r App. C-33a].

Therefore, petitioners' claims were decided on independent state law grounds and no substantial federal question exists.

II. COMPELLING JUSTIFICATION

Review by the United States Supreme Court "on a writ of certiorari is not a matter of right, but of judicial discretion" which "will be granted only for compelling reasons." S. Ct. R. 10. Petitioners ask this Court to grant certiorari in this case "to resolve the circuit split. . . ." [Pet. 10]. However, the petition itself demonstrates that there is not actually a split of authority on the issue of recognizing a cause of action

for clergy malpractice. After noting that some courts have refused to consider claims for either breach of fiduciary duty or clergy malpractice, the petition states that: "Several other court have addressed the issue of clergy malpractice, *none explicitly recognizing it as a cause of action*." [Pet. 11 (emphasis added)]. Therefore, petitioners have conceded that the various jurisdictions uniformly reject a cause of action for clergy malpractice. Despite stating that a split of authority exists, petitioners have not identified a single case to recognize such a cause of action.

All that the petition arguably demonstrates is a possible split of authority regarding a claim for breach of fiduciary duty by a parishioner against a cleric. However, as discussed in Part I(B), *supra*, the New York State Court of Appeals specifically held that petitioners' failed to plead such a cause of action and, thus, the issue was not properly before the Court.

Petitioners' attempts to claim that the Court of Appeals' decision will result in immunity for clerics who engage in sexual misconduct toward parishioners, and will prevent victims of such conduct from seeking redress in the courts, is also completely unfounded. First, the Court did not hold that a claim for breach of fiduciary duty could not be brought. Rather, it only held that these petitioners had failed to properly plead such a cause of action. The Court specifically indicated its willingness to consider the issue under an appropriate set of facts and pleadings. In this context it is also relevant that the New York Courts held that no counseling relationship actually existed, but was instead only "a convenient cover story should the two be seen together." [Pet'r App. A-8a].

Additionally, the intentional tort of battery remains available to victims of clergy sexual misconduct. In this particular case, petitioners' battery claims failed due to statute of limitations grounds and because the courts specifically found that Wende C. was capable of, and did, consent to the sexual contact. Any parishioner who does not consent, or who is legally unable to consent, may maintain an action for battery, provided he or she brings suit within the applicable limitations period.

Negligent hiring and/or supervision may also be available against the church, religious organization or individual superiors, depending on the particular facts of the case.

Therefore, there is no compelling justification for granting a writ of certiorari in this case.

CONCLUSION

Respondent Hae-Jong Kim respectfully submits that the petition for a writ of certiorari should be denied. This Court lacks jurisdiction to review the decision of the New York State Court of Appeals under 28 U.S.C. § 1257(a), because petitioners do not claim any right or privilege under the federal constitution or the laws or treaties of the United States and, as a result, there is no substantial federal question. To the extent that any federal question exists, the state court based its decision on independent, alternative state law grounds and did not decide the federal question. Furthermore, even if jurisdiction existed, there is no compelling justification for granting review in this case. There is no split of authority regarding claims for clergy malpractice; such claims are universally rejected by state and federal courts. Even if a split of authority arguably exists with respect to claims against clerics for breach of fiduciary duty, that cause of action was not properly before the Court of Appeals and cannot provide the basis for granting certiorari. There is also no merit to petitioners' assertion that actual victims of clergy sexual misconduct will be left without adequate remedies.

Respectfully submitted,

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